255 rules had been issued.[23] Once again, we reiterate our concerns that such agreements not be permitted to go forward if a party to such agreement is not in compliance with Section 255.

The FCC also asks how responsibility for compliance with the accessibility and compatibility guidelines should be apportioned between network equipment and service providers that incorporate that equipment into the network. NPRM ¶80. It would seem that this should be dealt with on a case-by-case basis, considering carefully, in each instance, the source of the failure to provide access. Where the source is both, both should be held accountable.

F. Disability

We support use of the ADA's definition of disability, as well as the Access Board's list of categories of common disabilities. See NPRM ¶70.

VI. Application of the Readily Achievable Standard Should Parallel Application of this Standard Under the ADA, Taking into Consideration Telecommunications-Specific Factors Only.

Under Section 255, manufacturers and service providers must make their offerings accessible or compatible if it is readily achievable to do so. As the FCC notes in its NPRM, Section 255(a)(2) provides that "[t]he term 'readily achievable' has the meaning given to it by section 301(9) of [the ADA]." NPRM ¶94. The FCC's NPRM offers an extensive analysis of the term "readily achievable," noting that the existence of ADA factors does not appear to "preclude [its] consideration of telecommunications-specific factors not enumerated in the ADA." NPRM ¶98 n.198.

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[23] See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, First Report and Order, ¶998, 11 FCC Rcd 15499 (1996).

We agree that the telecommunications context may warrant consideration of certain factors that were not applicable under an ADA analysis of structural accessibility. However, many, if not most of the newly proposed factors now proposed for the Section 255 readily achievable standard are *not* telecommunications-specific. In fact, many of the new factors suggested could have easily been applied in the ADA context.

When Congress incorporated the readily achievable standard in Section 255, it did so fully aware of the long line of agency interpretations, administrative decisions, and court cases that had already applied this standard under the ADA. For the most part, the analyses applied by these various forums compared the costs of providing access with the overall resources of the entities covered by the ADA's provisions. With a few exceptions, the same test should be applied here.

A. Feasibility

The FCC offers several reasons why a particular access feature may not be feasible: 1) technical feasibility: i.e., physical impossibility or where technology is not available to develop an access solution; 2) legal impediments; or 3) where implementing features to improve access for one disability might limit access for another. NPRM ¶101. A discussion of each of these factors follows.

1. **Technical feasibility**

The extent to which adding an access feature is technically feasible, or the extent to which technology is available to achieve accessibility, are legitimate considerations in the telecommunications context. First and foremost, however, in permitting this defense, the FCC should insist upon proof of technical infeasibility, rather than unsupported assertions that a technical solution is unavailable. Second, this defense should only be permitted to the extent that

technical feasibility could not be achieved during the design and development of the product or service. Indeed, the FCC itself notes the greater difficulties that arise when trying to incorporate accessibility past these early stages. Under its discussion of timing, the FCC acknowledges that "technological features available at the beginning of a product development cycle can be incorporated more easily . . . than those that become available at the end of the development cycle." NPRM ¶120. A company should not be permitted to assert this "readily achievable defense" if the access problem could have been avoided through incorporation of access features early in the design processes.

2. **Legal impediments** - While unclear in the NPRM, it would seem that the FCC's decision to permit the existence of a legal impediment as a defense to providing access is designed to protect companies that are unable to obtain licenses for access solutions, or where contracts otherwise prevent the incorporation of such solutions. We request that the FCC elaborate on the use of this defense, so that its meaning is fully understood, and so that it is not abused in any way.[24] Additionally, we urge the FCC not to permit this defense unless the company asserting this factor is able to demonstrate that it has undertaken, though unsuccessfully, whatever efforts may have been necessary to eliminate the legal obstacles impeding access.

3. **Impeding other types of accessibility** - Consumers with disabilities most certainly have an interest in not curtailing one type of access for another. Nevertheless, this concern, although legitimate, would be more appropriately considered elsewhere in the FCC's rules, as it is

[24] For example, contracts specifically designed to avoid Section 255 compliance should not be tolerated.

separate and apart from the extent to which it is readily achievable to make a product or service accessible.

B. Expense

We agree that it is reasonable to consider any tangible and actual costs that must be incurred in achieving accessibility. See NPRM ¶103-104. The costs of engineering staff, fabrication facilities, and licensing fees are examples of costs that companies may incur in achieving access, and which legitimately may be considered in a readily achievable analysis.

We disagree, however, that companies should be able to consider "opportunity costs," loosely defined by the FCC as the costs associated with decreasing access with respect to another disability, or otherwise reducing product or service performance in another way. These "costs" are highly subjective. Without clearly defined and objective measures for determining these costs, consumers are left at the mercy of companies who, on their own, may determine that the "opportunity costs" for achieving a certain type of access are prohibitive.

Similarly, we oppose consideration of the additional income that an access feature will provide in a readily achievable analysis. Although we understand the FCC's well-intended objective to have companies consider the additional income they will bring in as the result of adding access, in fact this factor may result in providing companies with an added excuse not to incorporate access, where it is expected that such access is *not* likely to bring in much income. This might occur, for example, where the market of individuals with disabilities is small, as may be true for products or services designed for individuals with multiple disabilities, such as deaf-blindness. Although the ADA permits consideration of a wide variety of expenses, no cases or agency interpretations to date have used opportunity costs or projected income as permissible

factors in a readily achievable determination.[25] Nor has the FCC justified the need for consideration of this factor in the telecommunications context only.

C. Practicality

Under the Section 255 readily achievable standard, the FCC proposes to allow consideration of whether an access feature is practical, given the expenses involved. NPRM ¶106. Here, the FCC lists a number of factors:

1. **Resources** - A provider should be permitted to consider its resources, including, but not limited to, its financial resources, staff resources, and the facilities that it has available to meet the expenses associated with accessibility. See NPRM ¶106. The FCC proposes to establish "a presumption that the resources reasonably available to achieve accessibility are those of the entity . . . legally responsible for the equipment or service that is subject to the requirements of Section 255." NPRM ¶109. It goes on to state that this presumption may be rebutted where either the assets and revenues of a parent or affiliate are available to the provider (and may thus be taken into consideration) or where a respondent may show that a sub-unit does not have access to the full resources of the legally bound corporation. We support the FCC's analysis on these points, as it is consistent with that of the Department of Justice under the ADA,[26] and case law interpreting the ADA. For example, in Arnold v. United Artists Theater Circuit Inc. (United Artists),

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[25] Nondiscrimination on the basis of disability by public accommodations and in commercial facilities. 56 Fed. Reg. 35543, 35594 (July 26, 1991); 28 C.F.R. Part 36.104; see also discussion of court cases on readily achievable below.

[26] 56 Fed. Reg. at 35553-54. The Department of Justice's analysis explained that "in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable," and that the resources of the parent corporation should be considered to the extent those resources may be allocated to the local facility. Id.

plaintiffs had challenged conditions at several movie theater locations all owned by the same corporate defendant, United Artists. The court concluded that

> whether a proposed change is deemed "readily achievable" under the ADA depends on the defendant firm's "overall financial resources." 42 U.S.C.§12181(9)(b)[B]; 28 C.F.R. §36.104. For multi-site companies such as UA, the ADA expressly requires that defendant assess the financial condition, not just of the sites involved, but of the entire corporation.[27]

2. **Market Considerations**

The FCC proposes to allow companies to consider the potential market for the more accessible product, and the extent to which the more accessible product could compete with other offerings in terms of price and features. NPRM ¶115. While obviously not intended to do so, consideration of this "market" factor may well defeat the entire purpose of Section 255. Long ago - indeed in its very first piece of federal legislation expanding telecommunications access for individuals with hearing disabilities, the Telecommunications for the Disabled Act of 1982 - Congress acknowledged the problems of relying on competition in the marketplace as a means of achieving accessibility. As noted above, the 1982 Act was designed to permit continued cross-subsidization of specialized telephone equipment with service revenues, notwithstanding the FCC's Computer II prohibition against such subsidies. Congress explained that reliance on market forces to keep the costs of such equipment down would not work for individuals with disabilities:

> For most ratepayers, deregulation may indeed ensure a competitive market in telephone sets and eliminate subsidies for such sets from local rates. For the disabled, however, the ban on cross-subsidization could mean unregulated price increases on the costly devices that are necessary for them to have access to the telephone network. Disabled persons

[27] 7 ADD 1165, 1187 (1994), citing 42 U.S.C. §12181(9)(C); 28 C.F.R. §36.104.

who are unable to afford the full costs of this equipment will lose access to telephone service.[28]

Indeed, the very reason that Section 255 - as well as the ADA and other disability laws - have been needed at all has been that the marketplace has not responded to the needs of individuals with disabilities. To now suggest that manufacturers may not be required to create accessible products where such products are not likely to receive a great reception in the market negates the whole purpose of Section 255. Moreover, the FCC's proposal to permit consideration of the extent to which an accessible product can compete with other, inaccessible products simply sanctions the sale of inaccessible products that are more likely to bring in a greater share of the market.

The FCC should remember that even if this market factor is eliminated, there will be no competitive disadvantage for companies complying with Section 255. Because the law is evenly applied across the marketplace, it will affect all companies similarly. Rather, a balancing of the costs of providing access with the resources available to the covered entity will protect companies whose resources are unable to handle accessibility expenses.

On a related matter, the FCC has raised concerns about an Access Board guideline which states that no change in a product shall be undertaken that has the effect of decreasing the accessibility, usability, or compatibility of telecommunications equipment or CPE.[29] Specifically, the FCC seeks to ensure that this principle not operate "to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances." NPRM ¶114. The

[28] H. Rep. No. 97-888, 97th Cong. 2d Sess. 3-4 (1992)

[29] NPRM ¶114, citing to 36 C.F.R. §1193.39(a).

FCC's statement appears to assume that disability access will stand in the way of technological advances. This, of course, is an incorrect premise, as we have, on several occasions, shown that accessibility features can enhance the desirability of a product or service. We are concerned with the FCC's position for another reason. The needs of individuals with disabilities have, more often than not, been afforded second class status. Although individuals with disabilities certainly do not wish to stifle innovation and technological advances for the general population, nor do we wish to take steps backwards as these advances are made. At a minimum, then, the NAD urges the Commission to adopt a rule requiring that access functions already incorporated into products and services not be lost as these offerings are upgraded. Stated otherwise, where products and services are changed or improved, the means of providing access for a particular disability may need to change as well, but under no circumstances should individuals who once had access to a particular offering lose access altogether. To do otherwise would directly contravene the very objective of Section 255, to increase, not decrease, accessibility for individuals with disabilities.

3. **Cost Recovery**

The FCC has proposed yet a third factor - cost recovery - under the concept of "practicality." This is defined as the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. NPRM ¶115. This factor is troubling, as it permits a company to consider whether it expects to recover the incremental cost of the accessibility feature, and the extent to which absorbing the cost would provide a disincentive to offering the product. Put simply, these are considerations which are quite foreign to the concept of readily achievable as applied under the ADA, and which are likely to provide a significant escape route for covered entities seeking to avoid their Section 255 obligations. It is

critical to note here that the Department of Justice expressly rejected a similar consideration in its application of the readily achievable standard to entities covered under the ADA. In the preamble to its final rules implementing Title III of the ADA for places of public accommodation, DOJ explained that it had originally proposed a rule which would have stated that "barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation."[30] DOJ deleted this section from its final rules, explaining that "[m]any commenters objected to this provision because it impermissibly introduced the notion of profit into a statutory standard that did not include it."[31] Having patterned Section 255's readily achievable language on application of this standard under the ADA, Congress similarly could not have intended cost recovery or profit to be included as a factor for consideration by the FCC. There is nothing unique to telecommunications that warrants inclusion of this factor at this time. An example will demonstrate this point.

Under Title III of the ADA, stadiums must be accessible to individuals with disabilities. Under the FCC's analysis, the owners of a stadium in a small town that has only a few citizens who use wheelchairs would be able to argue that they should not be required to provide accessible seating because they may not be able to recover the costs of providing such access. Under an ADA analysis, however, so long as these owners have resources available to provide such access - whether on their own or through a lucrative parent corporation - they would be required to provide the accessible seating. The owners of the stadium would not be permitted to consider the

[30] 56 Fed. Reg. at 35569, citing proposed rule 28 C.F.R. §36.304(f)(1).

[31] Id.

likelihood of recovering their costs, and the disabled citizens of and visitors to the town would gain much needed access to the stadium.

The analysis that we put forth today is substantiated by federal courts that have interpreted the readily achievable test. In Pinnock v. International House of Pancakes (Pinnock), for example, the court deferred to the specific factors enumerated in the ADA itself and the analysis set forth by the DOJ in weighing the financial resources and economic strength of the defendant with the costs of the requested accommodations.[32] There, the court determined that requiring the owner of a restaurant to make its restroom accessible to persons in wheelchairs did not constitute a taking of private property without just compensation. Similarly, in Slaby v. Berkshire, a case involving barriers to a golf course, the court explained that the readily achievable standard "balances the cost of construction and ability of the business to pay against the need of the disabled persons at the facility."[33] Although the respondent in Slaby prevailed because it had already taken reasonable measures to provide accessibility, the ability of the country club housing the golf course to recover its costs simply was not at issue. See also Neff v. American Dairy Queen Corp.,[34] (scope of injunctive relief if ADA violation is proven would depend in part on the financial strength of the defendant); United Artists (court emphasized the availability of the defendant corporation's resources in certifying plaintiffs' class action against the movie theater chain).

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[32] 3 ADD 482, 491, 844 F. Supp. 574 (1993).

[33] 928 F. Supp. 613 (1996)

[34] 58 F. 3d. 1063 (5th Cir. 1995)

4. **Timing**

The FCC notes that because access features available at the beginning of a product development cycle can be incorporated more easily than those available at the end of a cycle, a company should be permitted to consider the periods of time needed to incorporate new access solutions in products under development. NPRM ¶120. While we generally agree with this approach, it is important for the FCC to recognize, and for covered entities to be reminded, that the Access Board guidelines direct manufacturers to evaluate accessibility, usability, and compatibility "throughout product design, development, and fabrication. . ."[35] There may, in fact, be times where, although it had not been technically feasible to include access during the design stage of a product or service, a readily achievable technical solution is located later on in the development of the product. In this instance, the company, under the readily achievable analysis, should be required to incorporate access if its resources can handle it. In other words, although a company would be wise to search for access solutions as early as possible in the design process, the company should not be permitted to end that search prematurely; rather, efforts should continue throughout the design, development, and fabrication of the product or service. It may, however, be permissible for a company to assert, as a timing defense, that incorporation of an access feature (i.e., late in the production process) would result in an extensive delay in the release of the product or service on the market, (i) if such a delay would actually ensue, and (ii) if that delay could not have been prevented by earlier consideration of access needs.

[35] 36 C.F.R.§1193.23(a).

The FCC has tentatively concluded that once a product is introduced on the market without accessibility features that were not readily achievable, Section 255 does not require subsequent modification of the product. NPRM ¶120. In a related vein, however, the Access Board guidelines apply to both new products and "existing products which undergo substantial change or upgrade, or for which new releases are distributed."[36] This guideline, originally offered as a TAAC recommendation, is intended to apply to changes that affect the functionality of the product, rather than cosmetic or minor changes. Such a provision is critical. It is needed to ensure that where modifications to products are substantial, efforts to incorporate access will be undertaken. We urge its inclusion in the FCC's final rules.

Finally, the FCC has concluded that a grace period for compliance with Section 255 is not warranted. (¶121) We strongly support this conclusion, given the considerable amount of time that has already passed since enactment of this section.

D. Other Considerations

We agree with the FCC that readily achievable determinations should be made on a case-by-case basis. NPRM ¶122. Indeed, at least one court has rejected any type of numerical formula for a readily achievable analysis. In Pinnock, the court cited to the DOJ language on this point:

> The Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodation requirements and the economic situation that any particular entity would find itself in at any moment.[37]

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[36] 36 C.F.R. §1193.2.

[37] 3 ADD at 491, citing 28 C.F.R. §36.104, App. B, at 577.

Because the covered entities under Section 255 are similarly diverse, a single numerical test would make little sense under Section 255.

In conclusion, the readily achievable test should remain one that, for the most part, compares the costs of providing access with the overall resources available to the covered entity on a case-by-case basis, taking into account any technological or legal barriers to achieving such access. To rule otherwise would be to contravene the intent of Congress which, when it adopted the readily achievable standard, believed that it had patterned that standard after its application under the ADA.

VII. Modifications to the Complaint Resolution Process Are Necessary to Ensure the Efficient and Effective Enforcement of Section 255.

A. Fast Track

Because the Commission intends to rely on consumer complaints as one of its primary means of monitoring and enforcing compliance with the Section 255 requirements, accessible and efficient complaint procedures are necessary to ensure that all Americans gain the benefits of advances in telecommunications services and equipment. Toward this end, the Commission proposes that its involvement in the enforcement process begin with a "fast track." NPRM ¶¶126-143. The "fast track" complaint procedure, if implemented correctly, could significantly aid consumers, manufacturers and service providers in addressing accessibility problems swiftly and easily, thereby helping to ensure access to telecommunications services and equipment for persons with disabilities. The NAD agrees with the Commission that it should handle complaints in a "streamlined, consumer-friendly manner, with an eye toward solving problems quickly," NPRM ¶3, and offers the following suggestions to assure the success of a fast track process.

First, the NAD supports the Commission's proposal to encourage, but not require, consumers to directly contact a manufacturer or service provider before submitting a complaint to the FCC. NPRM ¶128. By directly contacting the manufacturer or service provider, the consumer may be able to resolve the problem quickly and easily, without involving the Commission. However, to be able to do this, consumers must know whom to contact and how. Manufacturers and service providers should be required to designate representatives to handle Section 255 complaints.[38] Depending on the size of the company and the array of products and services offered, manufacturers and service providers may want to designate a single contact point for the company or designate different contact points for different product offerings. The Commission should make the names and methods for contacting these representatives available to the public, either through the FCC or through the manufacturers and service providers themselves, and should make the submission of such data mandatory. See NPRM ¶134. Without this list, consumers will be without information vital to the informal resolution of many complaints that need not reach the FCC. Similarly, we agree with the Commission that equipment manufacturers and service providers should be required to establish multiple contact methods, accessible to as many disabilities as possible. NPRM ¶133.

[38] See generally ¶¶132-33, proposing accessible contact points for manufacturers and service providers. Designating a specific representative is similar to the broadcasters' "children's liaison," a designated individual at each television station responsible for handling inquires and complaints regarding compliance with children's programming requirements. The name and method of contacting the children's liaison must be made available to the public. 47 C.F.R. § 73.3526(a)(8)(iii); *See* Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broadcast Stations, Report and Order, MM Docket No. 93-48, August 8, 1996, 11 FCC Rcd 10660, 10690.

consumer groups stand ready to assist in distributing information about this contact point to people with disabilities through our newsletters and Internet sites.

It is critical for the Commission set up a comprehensive training program for staff members assigned to handle Section 255 complaints and inquiries. The legal and technological issues concerning Section 255 can be complex; having a knowledgeable staff, familiar with Section 255 and accessibility issues in general, is vital to the successful enforcement of Section 255. Additionally, FCC staff appointed to receive complaints should have the means of keeping records of such complaints, so that patterns and practices of noncompliance are brought to the Commission's attention.

Keeping consumers informed and involved is of primary importance throughout the complaint resolution process. The Commission should notify consumers when it has referred their complaints to manufacturers or service providers. See NPRM ¶133. Included with this notification should be information on the time allotted for a response by the manufacturer or service provider, the FCC's evaluation procedure, and options available to the consumer if the problem cannot be resolved through the "fast track" process. See NPRM ¶142. Where the FCC determines that a complaint is outside the scope of Section 255, it should also inform consumers about avenues of redress that may be available elsewhere. Id.

The Commission should require manufacturers and service providers to submit a report to the FCC responding to the complaint, with copies to the complaining party, explaining whether it has provided access, and if not, why not. ¶139. A report will be necessary for the complainant to decide whether the manufacturer or service provider has addressed the accessibility problem satisfactorily and whether to pursue the second phase of complaint resolution. Because the consumer may need this report during the second phase, we oppose the Commission's suggestion

The Commission should require manufacturers and service providers to submit a report to the FCC responding to the complaint, with copies to the complaining party, explaining whether it has provided access, and if not, why not. ¶139. A report will be necessary for the complainant to decide whether the manufacturer or service provider has addressed the accessibility problem satisfactorily and whether to pursue the second phase of complaint resolution. Because the consumer may need this report during the second phase, we oppose the Commission's suggestion that respondents be able to submit their reports via telephone call. NPRM ¶138. The respondent's report should be in a permanent format, whether that is via electronic mail, facsimile, written correspondence, or other format accessible to the complainant.

The Commission has proposed a five-day response period for the "fast track" procedure. NPRM ¶136. If manufacturers and service providers keep accurate records regarding their efforts for ensuring product and service accessibility, they should not need a great deal of time to respond to consumer complaints. However, given the likely complexity of many Section 255 complaints, the period proposed by the Commission may not provide manufacturers and service providers adequate time to evaluate and address accessibility problems. The result is likely to be endless requests for extension of time, which would defeat the purposes of Section 255. Accordingly, the NAD proposes that the Commission allow ten working days for manufacturers and service providers to briefly respond to consumer complaints, with an outside limit of thirty calendar days for this "fast track" period if extensions are requested. See NPRM ¶137. If a complaint cannot be resolved within thirty days, it should move on to the second phase of dispute resolution. We support the decision by the FCC to close the matter only if (i) the access problem is resolved or (ii) there is no underlying compliance problem, in which case the matter will go to

the second phase of dispute resolution processes, where the FCC can determine the "nature and magnitude of problem, and take appropriate action." NPRM ¶140. This will provide a much needed safeguard for consumers, and will reveal patterns of noncompliance.

The NAD wishes to note as well that we believe that the following features of the FCC's fast track phase will work toward achieving a streamlined, consumer-friendly complaint process:

- Allowing persons with disabilities to submit complaints by any accessible possible means, NPRM ¶129;
- Allowing complaints to be brought without any time limit NPRM, ¶149;
- Distribution of an FCC sample complaint form that is not otherwise required by the FCC, NPRM ¶131;
- The willingness of the FCC to initiate discussions with consumer or industry access experts and the Access Board, for the purpose of reviewing specific complaints and access questions, NPRM ¶¶141, 161;
- Requiring that Section 255 complaints need only be submitted once, with no requirement for re-filing at the end of the informal process as a condition for moving to formal dispute resolution, NPRM ¶154;
- Permitting the joinder of respondents. This is especially important, since there may be situations where a complaint will be brought against both a service provider and a manufacturer for the same violation, NPRM ¶154; and
- Permitting the joinder of complaints, and complaints involving different accessibility aspects of the same products, NPRM ¶154.

B. Informal and Formal Complaints

As a consumer complaint moves to the second phase for either informal or formal resolution, the FCC needs to continue to establish time limits for the complaint's resolution. Toward this end, the NAD strongly urges the Commission to apply the five-month deadline established under Section 208 of the Communications Act. NPRM ¶156[39] The Conference

[39]See 47 U.S.C. § 208(b)(1).

Report for the Telecommunications Act of 1996 explained that "the remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255."[40] Insofar as Section 208 is directly applicable to the enforcement of Section 255, it follows that the five-month time period should also apply to Section 255 complaints.

Even were the Commission to conclude that Section 208 does not apply to all Section 255 complaints, it should nevertheless issue a rule that requires it to resolve Section 255 complaints within five months, following the guidance that Section 208 provides. By recently tightening the time for the resolution of Section 208 complaints from twelve to five months and eliminating extensions in complex cases, Congress has made clear its interest in achieving swift adjudication at the FCC. Additionally, as the Commission itself has recognized, "accessibility delayed is accessibility denied," NPRM ¶124, and an outer time limit for the resolution of accessibility complaints by the FCC is necessary to ensure that persons with disabilities can enjoy the benefits of advances in telecommunications services and equipment.

The FCC states that it will establish formal adjudicatory procedures only where the complainant requests those procedures, *and where the Commission, "in its discretion, permits the complainant to invoke [those] procedures."* NPRM ¶147. The NAD is gravely concerned about the Commission's tentative decision to condition formal complaints upon FCC approval. In its Notice of Inquiry on Section 255, the Commission made clear "that Congress has established in Section 255 the right of aggrieved parties to file complaints against any person who has allegedly

[40]S. 652, Conf. Rep., 104-230, 104th Cong., 2d Session 135 (1996).

violated Section 255."[41] However, in it NPRM, the Commission proposes to undermine that right without any justification. This appears to be both unprecedented and discriminatory against individuals with disabilities.[42] Section 255 already removes the private right of action from consumers. Insofar as the Commission has exclusive jurisdiction over enforcement, removing the automatic right to bring a formal FCC complaint raises serious concerns regarding the denial of due process for individuals with disabilities.

Where consumers do file formal complaints under Section 255, we agree with the FCC that they should not be made to pay a filing fee. NPRM ¶155. The Commission notes that it is required to impose a filing fee for formal complaints directed at common carriers, but may waive the fee if doing so would be in the public interest.[43] The fee, currently $150.00,[44] may in fact discourage consumers from filing formal complaints; this in turn could undermine enforcement of the accessibility mandates. Thus, it is in the public interest for the Commission to waive the filing fee and we urge the Commission to take such action.

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[41] *Implementation of Section 255 of the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities*, Notice of Inquiry, WT Docket No. 96-198 (September 17, 1996) ¶36.

[42] For example, no similar requirement for FCC approval exists with respect to formal complaints brought against common carriers under Section 208. 47 C.F.R. §1.720-1.735.

[43] NPRM ¶155 n. 276, citing Section 8(g) of the Communications Act, 47 U.S.C. §158(g).

[44] 47 C.F.R. §1.1105.

C. Alternative Dispute Resolution

After a complainant has initiated an informal or formal complaint, the complainant should reserve the right to request alternative dispute resolution at any time. NPRM ¶159. As the Commission is aware, the use of alternative dispute resolution may bring the matter to a more rapid conclusion without burdening the resources of the parties or the Commission. Certain safeguards will be needed to ensure fairness and accessibility during the alternative dispute resolution process. First, the Commission should establish guidelines, if none yet exist, for selecting neutral parties who are able to oversee the process. Second, the Commission must ensure that the alternative dispute resolution process is accessible to all parties. Already mandated under the Rehabilitation Act, this will require the provision of auxiliary aid and services, including, but not limited to, interpreters, computer-assisted real-time transcription services, and the provision of materials in alternative formats, where necessary. We encourage the use of outside experts such as the Association of Accessibility Engineering Specialists to help speed the resolution of complaints in the alternative dispute resolution stage.

VIII. The Full Range of Commission Remedies are Available under Section 255

We agree with the FCC that the Commission's full range of remedies, including those which exist pursuant to Sections 207 and 208, Section 312, and Section 503, should be available for Section 255 violations. NPRM ¶172. The FCC asks whether damages which may be awarded against common carriers under Sections 207 and 208 may also be available to other entities under Section 255. NPRM ¶33.

The Conference Report to Section 255 made clear that the "remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce

compliance with the provisions of section 255."[45] Insofar as manufacturers of telecommunications equipment and providers of telecommunications services are treated uniformly throughout Section 255 for all other purposes, there is no reason to draw a distinction between these covered entities with respect to remedies available for their noncompliance. Had Congress intended otherwise, it would have drawn such a distinction. Thus, we urge the FCC to clarify that the monetary damages available under Sections 207 and 208 are equally available against all entities covered under Section 255.

The FCC also seeks comment on whether it has a basis to order a product to be retrofitted if the product had been developed without access, where access would have been readily achievable. NPRM ¶172. So long as it would have been readily achievable to incorporate access into a product *or a service* during its design, development, or fabrication, the FCC has a basis to require that such access be incorporated at a later date, even if this will require some retrofitting. To rule otherwise would be to ignore the intent of Section 255's basic objective to expand accessibility. Companies that are forced to retrofit will soon realize - as will their competitors - the importance of considering and incorporating access at the outset of design and development.

Finally, the NAD supports use of the following measures suggested by the FCC to foster increased telecommunications accessibility (NPRM ¶174):

- establishment of a clearinghouse for product accessibility information and solutions;
- publication of information on manufacturer and service provider accessibility performance;
- additional information on the Internet at the FCC's Disabilities Issues Task Force Web site;
- establishment, by consumer and industry groups, of informational and educational programs,

[45] Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 21-22, 135 (1996)

product and service certification, and standards setting; and

- development of peer review processes.

VIX. Conclusion

We wish to thank the Commission for the opportunity to submit these comments and for its commitment to ensuring access to telecommunications products and services. In order to fulfill that commitment, we urge the Commission adopt the changes and modifications proposed herein.

Respectfully submitted,

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